

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN JOHN LORD,

Appellant.

No. 32624-8-II

UNPUBLISHED OPINION

QUINN-BRINTNALL, C.J. — Stephen J. Lord appeals the trial court’s refusal to grant him a Special Sexual Offender Sentencing Alternative (SSOSA)¹ on three counts of first degree child molestation. He argues that the court erred by (1) improperly considering statements he made during his presentence interview and SSOSA evaluations; and (2) imposing a sentence in excess of the maximum allowed by law in violation of *Blakely*.² We affirm.

FACTS

On May 31, 2001, Lord pleaded guilty to an amended information charging him with three counts of first degree child molestation for acts involving his granddaughters, which occurred between January 1, 1999 and December 31, 1999. In exchange for his plea, the State agreed to

¹ Former RCW 9.94A.120(8) (1998).

² *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

recommend that Lord receive a SSOSA. But our Supreme Court ruled in *In re Personal Restraint of Lord*, 152 Wn.2d 182, 195, 94 P.3d 952 (2004), that the State breached the plea bargain at Lord's initial sentencing hearing and remanded for resentencing before a different judge.

A second sentencing hearing was held on November 19, 2004. At the hearing, the court considered the information presented at his first sentencing hearing, including the Presentencing Investigation Report (PSI), plea statement, court file, polygraph submitted by John Ketchum, Lang Taylor's sexual deviancy evaluation, and the testimony of Dr. Whitehill.³ Additionally, Lord submitted letters of support urging the court to grant SSOSA. Sarah Fletcher, Lord's estranged wife, also spoke on his behalf and asked the court to grant Lord's request for SSOSA.

The court asked Fletcher whether there were any allegations or admissions involving anal sex in Lord's case. When she replied no, the following colloquy occurred:

THE Court: Looks like he was not charged with that, but admitted doing that. You do not know that?

MS. Fletcher: I did not.

THE Court: If I'm correct. I'll find out from the attorneys in just a minute.

I really have some concerns about putting this gentleman out in the community. These acts were -- and his conduct and his behavior and history, although there is no criminal act that is previously charged -- his whole history of sexuality is of concern.

Has he confided in you with reference to his other kinds of sexual conduct?

MS. Fletcher: Yes.

THE Court: I don't mean sexual preference, I could care less about that. I'm talking about acts of kind of an illegal nature.

MS. Fletcher: Towards? Do you mean with the grandchildren?

THE Court: Yes. Well, see, I think the state of knowledge of the treatment person, and from what I have read, is greater than the state of knowledge of even his family . . . or the people he'll come in contact with in the

³ The PSI states that Lord admitted to anally raping one of his granddaughters for a number of months. The defendant did not file any written objections or exceptions to the PSI.

community, and perhaps some who have said good things about him. That is of great concern because the earliest writer of the presentence report indicated that he was the master of manipulation.

Report of Proceedings (RP) (Nov. 19, 2004) 10-11.

Lord exercised his right to allocution. He told the court that his PSI interview was not long enough and that it mischaracterized his personality and alcohol addiction. He also told the court that his interviewer did not mention *Miranda*;⁴ the first thing the interviewer told him was to “relax” and that he and the State were going to recommend him for treatment.

The court then asked Lord the following question: “Was I mistaken in my representations of what I perceived was done? . . . [Fletcher] did not know of these things and was I mistaken?” RP (Nov. 19, 2004) at 18. Lord replied by saying: “Your Honor, honestly, I thought I had told her. . . . I thought I had brought that up to her.” RP (Nov. 19, 2004) at 19. He said he told Fletcher everything he could remember, just as he did at the polygraph.⁵

The court expressed its concern that, according to Taylor’s SSOSA evaluation, Lord had a 50 percent chance of re-offending. Lord replied that the report was over three years old and that he had undergone treatment since then.

Regarding Lord’s community support, the court stated:

I think you may have some support in the community. The issue is whether they are in a position to know and understand and if you have disclosed everything to

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁵ Apparently on his own initiative, and without notifying the court, Lord sought the services of another sex offender treatment provider, Taylor. *Lord*, 152 Wn.2d at 186. As part of this evaluation, Lord submitted to a polygraph that asked him to disclose his entire sexual history. The results indicated that he was not deceptive. Taylor’s report and Lord’s polygraph indicated that Lord admitted to digitally and orally penetrating the victims from the time the victims were each two years old, and on two occasions taking pornographic photos of them and sending some of these to his friends over the internet. Taylor found Lord amenable to treatment and recommended SSOSA.

them in which they could form a judgment about their trust in you. That's part of the problem, part of the issue.

RP (Nov. 19, 2004) at 22.

The court denied Lord's SSOSA request and sentenced him to a maximum standard range sentence of 130 months on each count to run concurrently and imposed an additional 36 months community custody required under former RCW 9.94A.120(10)(a) (1998).

In this appeal, we address three issues. First, whether the court properly relied on information contained in the PSI report and evidence that Lord failed to tell his family that he engaged in anal sex with his granddaughter and thus posed a greater risk to the community. Second, whether the court properly relied on unchallenged information in the PSI and SSOSA evaluation reports when the authors of the reports had not given *Miranda* warnings to Lord before conducting the interviews. And third, whether the court's sentence exceeded Lord's standard range.

ANALYSIS

Denial of SSOSA Sentence

Lord challenges the sentencing court's denial of SSOSA. SSOSA is a sentencing alternative available for first-time sex offenders who meet certain criteria. Former RCW 9.94A.120(8).⁶ If the court finds an offender eligible for SSOSA, it may order that the offender be examined to determine whether the offender is amenable to treatment. Former RCW

⁶ Former RCW 9.94A.120(8)(a)(i) states:

When [the] offender is convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense and has no prior convictions for a sex offense or any other felony sex offenses in this or any other state, the sentencing court, on its own motion or the motion of the state or the defendant, may order an examination to determine whether the defendant is amenable to treatment.

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9.94A.120(8)(a)(i). In deciding whether to grant a SSOSA, the court considers the SSOSA

evaluator's report, the victim's opinion as to whether the offender should receive SSOSA, and whether the offender and the community will benefit from the offender's participation in the program. Former RCW 9.94A.120(8)(ii).

The decision to grant or deny SSOSA is discretionary. *State v. Onefrey*, 119 Wn.2d 572, 575, 835 P.2d 213 (1992). Former RCW 9.94A.120(8)(a)(ii).⁷ The sentencing court is not required to accept the recommendation of the evaluator. Former RCW 9.94A.120(8)(a)(ii). Nor was the court here obligated to state reasons for its denial. *State v. Hays*, 55 Wn. App. 13, 15-16, 776 P.2d 718 (1989).⁸ We review the denial of a SSOSA sentence for an abuse of discretion. *Frazier*, 84 Wn. App. 752, 930 P.2d 345, *review denied*, 132 Wn.2d 1007 (1997).⁹ A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981).

Here, Lord maintains that the trial court's questioning and closing statement showed that it "placed great emphasis on the unsubstantiated assumption that [he] had engaged in anal sex, potentially with the victim, and [had] not told his family about it." Br. of Appellant at 5. He

⁷ After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative and consider the victim's opinion as to whether the offender should receive a treatment disposition under this subsection. If the court determines that this SSOSA is appropriate, the court shall then impose a sentence within the standard range (or if the sentence is less than 11 years of confinement, the court may suspend the execution of the sentence with specified conditions attached). Former RCW 9.94A.120(8)(a)(ii).

⁸ Lord submitted a statement of additional authority citing RCW 9.94A.670(4) which states that "[t]he court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. If the sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition." But this version of the statute was enacted after Lord committed the crime and it therefore does not apply to his sentence. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) (when determining a defendant's sentence, courts look to the time of the offense).

⁹ Under the Sentencing Reform Act of 1981, sentences within the standard range are not appealable; but procedural challenges are permitted. RCW 9.94A.210(1); *Onefrey*, 119 Wn.2d at 575 n.1; *see also*, *State v. Mail*, 121 Wn.2d 707, 854 P.2d 1042 (1993).

argues that “[b]asing the denial of [his] SSOSA on this uncorroborated assumption about [his] failure to tell his family and friends about sexual behavior [that] he may or may not have engaged in was an abuse of discretion on the court’s part.” Br. of Appellant at 5.

Under the Sentencing Reform Act, a trial judge may rely on facts that are admitted, proved, or acknowledged to determine “any sentence.” Former RCW 9.94A.370(2) (1996).¹⁰ This includes whether to grant a SSOSA sentence. Former RCW 9.94A.370(2); *see State v. Grayson*, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005). “‘Acknowledged facts’ include all those facts presented or considered during sentencing that are not objected to by the parties.” *Grayson*, 154 Wn.2d at 339 (citing *State v. Handley*, 115 Wn.2d 275, 282-83, 796 P.2d 1266 (1990)); *see also* former RCW 9.94A.370(2). This includes information stated in the presentence reports. Former RCW 9.94A.370(2).

The record before the sentencing court included a PSI. The PSI stated that Lord admitted he had sodomized one of his granddaughters for a number of months. Lord did not object to the contents of the PSI and thus acknowledged this information for purposes of sentencing. Fletcher told the court that Lord’s sexual misconduct did not involve anal sex. But at sentencing, when the court asked Lord whether he had told Fletcher about having had anal sex with his granddaughter, he answered, “Your Honor, honestly, I thought I had told her. . . . I thought I had

¹⁰ Former RCW 9.94A.370(2) read in full:

In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range except upon stipulation or when specifically provided for in RCW 9.94A.390(2)(c), (d), (f), and (g).

brought that up to her.” RP (Nov. 19, 2004) at 19. Accordingly, in deciding whether to grant Lord’s SSOSA request, the trial court was permitted to rely upon information that Lord had failed to tell his family members who were urging the court to grant him a SSOSA the whole truth about his sexual relations with his granddaughter.

The information in the PSI and the recommendations of three SSOSA evaluators that Lord’s addictive personality, manipulative behavior, and sociopathic tendencies made him a poor candidate for SSOSA are reasonable grounds that support the trial court’s decision to deny Lord’s request for a SSOSA.

Miranda

Lord asserts that the sentencing court was not permitted to consider statements that he made to his presentence interviewer because the community corrections officer did not give him *Miranda* warnings before conducting the interview.¹¹ Lord did not raise this issue during his first appeal. Moreover, on remand he claimed at his sentencing hearing that he was not given *Miranda* warnings before the presentence interview, but he did not ask the court to exclude the statements. We do not consider arguments made for the first time on appeal. RAP 2.5(a). Lord’s Statement of Additional Grounds (SAG)¹² includes an affidavit describing the factual circumstances surrounding his PSI interview and SSOSA evaluations, but our review is limited to an examination of the record presented to the lower court. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). In addition, Lord acknowledged and did not move to suppress the

¹¹ In his brief, Lord argued that the court erred by considering statements he made to his SSOSA evaluator regarding instances of anal sex because the evaluator failed to give him *Miranda* warnings. But the information regarding Lord’s anal sex activity was in his PSI, not the SSOSA evaluation reports.

¹² RAP 10.10.

PSI statements regarding anal sex, and he cannot now demonstrate manifest error or actual prejudice allowing for our review. *McFarland*, 127 Wn.2d at 333.

Ineffective Assistance of Counsel

Citing *State v. Bankes*, 114 Wn. App. 280, 57 P.3d 284 (2002), Lord asserts that his counsel was ineffective for failing to move to exclude statements he made during the psychiatric evaluations which he claims were made without *Miranda* warnings. But Lord's reliance on *Bankes* is misplaced. The sentencing court here relied on the SSOSA evaluations and the presentence report to determine Lord's suitability for a SSOSA which he requested. It did not use the information for an undisclosed purpose such as establishing aggravating factors to support an exceptional sentence as the court did in *Bankes*. 114 Wn. App. at 287-90. Compare *State v. Everybodytalksabout*, 131 Wn. App. 227, 126 P.3d 87 (2006) (holding that a presentence investigator's interview was not an interrogation requiring *Miranda* warnings when the interview was conducted to prepare a nonbiased presentence report for the court and did not attempt to coerce the defendant into confessing, but merely asked the defendant for his account of the crime to which he had already pleaded guilty).

Under Lord's theory, to be effective, his counsel would have had to move to suppress Lord's statements mid-hearing after it became apparent that the sentencing court was not inclined to grant Lord's SSOSA request. This was not reasonably possible and Lord's counsel was not ineffective for not moving to suppress Lord's statements.

In his SAG, Lord additionally requested that, should we remand for resentencing, all psychological evaluation information, including reports, testimony, recommendations, and polygraph tests be stricken from the record. For the reasons already stated, this claim has no

merit.

Pro Se

Blakely

Lord asserts that his punishment is invalid because the aggregate of his sentence and community custody exceed the statutory maximum sentence for his offense.

He argues that the maximum standard range sentence that he received, combined with the three years of community custody imposed under RCW 9.94A.710, exceeded the statutory maximum sentence for his offense.¹³ He asserts that his sentence violates his Sixth Amendment right to a jury trial as set out in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), *Blakely*, 542 U.S. 296, and *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005).

Lord's argument lacks merit. The court imposed a standard range sentence of 130 months incarceration plus 36 months community custody.

Apprendi requires a jury to find facts, other than prior convictions, which increase the penalty for a crime beyond the prescribed statutory maximum. 530 U.S. at 490. According to *Blakely*, the "statutory maximum" means "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303. It is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *State v. Kinneman*, 155 Wn.2d 272, 278, 119 P.3d 350 (2005) (quoting *Blakely*, 542 U.S. at 302).

¹³ The trial court properly imposed community custody under former RCW 9.94A.120(1), not RCW 9.94A.710. *Varga*, 151 Wn.2d 179 (time of the offense determines which sentencing rules apply).

The addition of a term of community custody does not implicate *Blakely* because it does not require any additional factual findings before the mandatory term of community custody is imposed. Lord's plea alone, without additional findings, supports the imposition of his standard range sentence plus the 36 months community placement. Former RCW 9.94A.120 states: "When a person is convicted of a felony, the court shall impose punishment as provided in this section . . . [and] the court shall impose a sentence within the sentence range for the offense." Former RCW 9.94A.120(1). And when a person is sentenced to the custody of the Department of Corrections for a sex offense committed in 1999, in addition to the terms of the sentence, the court must sentence the offender to community custody for three years or up to the period of earned release awarded under former RCW 9.94A.150(1) and (2) (1996), whichever is longer. Former RCW 9.94A.120(10)(a).

This statute applies to sex offenses committed in 1999. Former RCW 9.94A.120(10)(a). Lord pleaded guilty to crimes committed between January 1, 1999 and December 31, 1999. Thus, the applicable statutes required Lord's sentencing court to impose community custody without finding any facts other than those included in his guilty plea. For these reasons, Lord's sentence does not violate *Blakely*'s jury trial requirements.

The trial court properly considered the presentence report and evaluations of sex offender treatment providers in determining Lord's suitability for SSOSA. On finding that he was not a good candidate for a SSOSA, the court imposed a standard range sentence as required under the

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statutes in effect at the time he committed the crimes charged. These rulings were proper and we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

ARMSTRONG, J.

VAN DEREN, J.